



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Regulation of Representatives in Agency **Adjudicative** Proceedings

Ad Hoc Committee

Proposed Recommendation | December 16, 2021

**Commented [OC11]:** The Committee voted to replace the original title of this Recommendation (*Regulation of Representatives in Agency Proceedings*).

1 Many agencies have adopted rules governing the participation and conduct of attorneys  
2 and non-attorneys who represent parties in adjudicative proceedings. These rules may address a  
3 wide array of topics, including who can represent parties in adjudications, how representatives  
4 must conduct themselves, and how the agency enforces rules of conduct.<sup>1</sup> Some agencies have  
5 drafted their own rules. Others have adopted rules developed by state bar associations or the  
6 American Bar Association’s (ABA) *Model Rules of Professional Conduct*. Agencies provide  
7 public access to their rules in different ways, including publishing them in the *Federal Register*  
8 and *Code of Federal Regulations* and posting them on their websites. Some agencies have  
9 provided explanatory materials to help representatives, parties, and the public understand how  
10 the rules operate.

11 Agency authority to set qualifications for who may serve as a representative depends on  
12 whether the potential representative is an attorney or non-attorney. For attorneys, the generally  
13 applicable Agency Practice Act provides, with some exceptions, that “any individual who is a  
14 member in good standing of the bar of the highest court of a State may represent a person before  
15 an agency,”<sup>2</sup> though some statutes authorize agencies to impose additional qualification  
16 requirements. Agencies generally have greater discretion under the Administrative Procedure  
17 Act and agency- or program-specific statutes to determine whether persons who are not attorneys

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<sup>1</sup> See George M. Cohen, Regulation of Representatives in Agency Proceedings, (Oct. 28, 2021) (draft report to the Admin. Conf. of the U.S.).

<sup>2</sup> 5 U.S.C. § 500(b).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

18 may act as representatives and, if they may, to establish the qualifications for doing so.

19 As a general matter, agencies have legal authority to establish rules governing the  
20 conduct of representatives and to take actions against representatives found to have violated such  
21 rules.<sup>3</sup> Courts have consistently found such authority inherent in agencies' general rulemaking  
22 power or their power to protect the integrity of their processes.<sup>4</sup> Agencies' disciplinary authority  
23 is not limitless, however, and agencies must determine what their governing statutes allow.

24 Agencies that adopt rules governing representatives will need to make a number of  
25 decisions as they decide the type of rules to adopt and how they will apply those rules. They  
26 must determine whether the rules will apply only to attorney representatives or will also apply to  
27 other representatives. They must decide whether to borrow language from rules drafted by other  
28 entities (state bars, ABA) or to draft their own rules. They must determine the particular conduct  
29 that the rules will regulate and whether to apply the same rules to attorneys and non-attorneys.  
30 And if they decide to adopt rules governing who may practice before the agency, they must  
31 ensure that they comply with the Agency Practice Act for rules applied to attorneys and  
32 determine the qualification standards, if any, they will establish for non-attorneys.

33 Once agencies have decided to adopt rules, they also must determine how to enforce  
34 those rules. Agencies may enforce rules in various ways, ranging from reminders or warnings to  
35 more serious actions, including disqualifying a representative from appearing in the current  
36 adjudication or future adjudications or imposing a monetary penalty. Agencies must satisfy  
37 themselves that they have the legal authority to undertake any such actions. Agencies also must  
38 determine whether to implement a program for reciprocal discipline, which involves imposing  
39 discipline on a representative found to have engaged in misconduct by another jurisdiction, or for  
40 referral procedures, which involve reporting attorneys' misconduct to another jurisdiction for

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<sup>3</sup> *See, e.g.*, 5 U.S.C. § 301.

<sup>4</sup> *See, e.g.*, *Checkovsky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986); *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580–82 (2d Cir. 1979); *Koden v. U.S. DOJ*, 564 F.2d 228, 233 (7th Cir. 1977).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

41 purposes of taking possible disciplinary action.

42 Agencies that have adopted rules must ensure that representatives, parties, and the public  
43 can easily access the rules. Agencies also must decide whether to provide additional explanatory  
44 materials and, if so, ensure that those are also easily accessible.

45 This Recommendation recognizes that agency adjudicative proceedings vary widely in  
46 their purpose, complexity, and governing law. Some processes are trial-like; others are informal.  
47 Some are adversarial; others are non-adversarial. Given the extensive variation in agencies'  
48 needs and available resources, this Recommendation focuses primarily on setting forth the  
49 various options agencies should consider in deciding whether to adopt rules and deciding on the  
50 content of those rules. It takes no position on whether agencies should allow non-attorney  
51 representatives. For agencies that decide to adopt rules for attorneys and, if they elect to do so,  
52 for non-attorneys, the Recommendation offers best practices for seeking to ensure that those  
53 rules are disseminated widely and that representatives, parties, and the public can understand the  
54 rules and how agencies go about enforcing them.

55 Although the Recommendation does not endorse harmonization of rules for its own sake,  
56 it does urge agencies to consider whether achieving greater uniformity among different  
57 adjudicative components within the agency or even across adjudicative components of multiple  
58 agencies might prove valuable for representatives who practice before a variety of components  
59 or agencies.<sup>5</sup> It also recommends that the Administrative Conference's Office of the Chairman  
60 consider preparing model rules that agencies can use when drafting their own rules.

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<sup>5</sup> Implicit in this Recommendation is the understanding that an attorney will not be placed in a position in which the attorney must act in contravention with rules of conduct of the state in which the attorney is licensed or authorized to practice.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### RECOMMENDATION

#### Adoption of Rules Governing Participation and Conduct

- 61 1. For federal agency adjudication systems in which parties are represented—either by  
62 attorneys or non-attorney representatives—agencies should consider adopting rules  
63 governing the participation and conduct of representatives in adjudicative proceedings to  
64 promote the accessibility, fairness, integrity, and efficiency of adjudicative proceedings.

#### Rules of Conduct

- 65 2. Agencies should consider whether to adopt or reference rules promulgated by other  
66 authorities or professional organizations or instead draft their own rules. Agencies should  
67 ensure that the rules are appropriate for the adjudicative proceedings they conduct and  
68 consider whether any modifications to adopted rules should be included. Agencies should  
69 consider whether any rules applicable to attorneys should be applied to non-attorneys and  
70 whether they should be modified before doing so.
- 71 3. Possible topics that agencies may wish to consider in their rules include actions likely to  
72 occur during a particular adjudication and actions that may occur outside a particular  
73 adjudication but that may still adversely affect the conduct of agency adjudications.  
74 Topics agencies may wish to consider include the following:
- 75 a. Engaging in conduct that disrupts or is intended to disrupt an adjudication;
  - 76 b. Making unauthorized ex parte contacts with agency officials;
  - 77 c. Engaging in representation of a client that conflicts with other interests, including  
78 representation of another client, or the attorney's personal interests;
  - 79 d. Filing frivolous claims or asserting frivolous defenses;
  - 80 e. Engaging in conduct that is prejudicial to the administration of justice, including  
81 conduct not limited to that occurring during an adjudication;
  - 82 f. Failing to provide competent representation;
  - 83 g. Improperly withdrawing from client representation;
  - 84 h. Unreasonably delaying the conduct of an adjudication;



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 85 i. Making a material intentional false statement;
- 86 j. Improperly seeking to influence the conduct of a judge or official;
- 87 k. Being convicted of a crime or being subject to an official finding of a civil
- 88 violation that reflects adversely on the attorney's fitness to represent clients
- 89 before the agency; and
- 90 l. Knowingly disobeying or attempting to disobey agency rules (including conduct
- 91 rules) or adjudicators' directions, or knowingly assisting others in doing so.
- 92 4. Agencies should consider whether divergence among rules governing different types of
- 93 adjudicative proceedings would create needless complexity in practicing before the
- 94 agency. This may entail harmonizing rules among different components of the agency. It
- 95 might also involve harmonization of style or language across rules as well as cross-
- 96 referencing of other rules of the agency. Agencies should also consider whether to
- 97 harmonize rules across agencies, especially in cases in which the same representatives
- 98 commonly appear before a group of agencies (e.g., financial agencies).

### **Agency Action in Response to Allegations of a Violation of Rules**

- 99 5. Agencies should specify in their rules how they will respond to an allegation of a
- 100 violation of their conduct rules, and they should publish these rules consistent with
- 101 Paragraphs 9 through 12. Among other topics, agencies should address:
- 102 a. Who can make a complaint and how to make it;
- 103 b. How notice of a complaint should be provided to the representative who is the
- 104 subject of the complaint;
- 105 c. Who adjudicates the complaint;
- 106 d. The procedure for adjudicating the complaint, including any rules governing the
- 107 submission of evidence and the making of arguments;
- 108 e. The manner in which a decision will be issued, including any applicable timeline
- 109 for issuing a decision;
- 110 f. Procedures for appealing a decision;
- 111 g. Who is responsible for enforcing the decision within the agency and



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 112 communicating the decision to other relevant authorities; and  
113 h. The process for identifying and dismissing complaints that are frivolous,  
114 repetitive, meant to harass, or meant primarily to delay agency action, including  
115 any consequences for persons filing such complaints.

### **Agency Action in Response to a Violation of Rules**

- 116 6. Rules should address what actions an agency may take in the case of a violation of the  
117 rules consistent with their authority to do so, including informal warnings short of  
118 sanctions and the range of available sanctions.  
119 7. For rules applicable to attorneys, agencies should consider whether to adopt any  
120 reciprocal disciplinary procedures or referral procedures.

### **Who Can Practice Before Agencies**

- 121 8. Agencies should, in compliance with the Agency Practice Act (5 U.S.C. § 500), only  
122 establish additional rules governing which attorney representatives can practice before  
123 the agencies if authorized to do so by separate statute. With respect to non-attorneys,  
124 agencies should determine what rules, if any, they will establish to govern who can  
125 practice before the agencies.

### **Transparency**

- 126 9. Agencies should publish their rules governing representatives' conduct in the *Federal*  
127 *Register* and codify them in the *Code of Federal Regulations*.  
128 10. When agencies adopt rules promulgated by another entity, which may in some instances  
129 be copyrighted, they should ensure that the rules are available to the public at no cost and  
130 that they provide links on their website or another mechanism for easily accessing those  
131 rules.  
132 11. Agencies should also publish their rules governing representatives' conduct on a single  
133 webpage or in a single document on their websites and clearly label them using a term



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 134 such as “Rules of Conduct for Representatives.” The agency should clearly indicate  
135 whether the rules apply only to attorneys, non-attorneys, or both.
- 136 12. On the webpage or in the document described in Paragraph 11, agencies should also  
137 publish information concerning qualifications for representatives (including for non-  
138 attorneys as applicable), how to file a complaint, and a summary of the disciplinary  
139 process.
- 140 13. On the webpage or in the document described in Paragraph 11, agencies should consider  
141 providing comments, illustrations, and other explanatory materials to help clarify how the  
142 rules work in practice.
- 143 14. Agencies should consider publishing disciplinary actions, or summaries of them, on the  
144 webpage or in the document described in Paragraph 11 so as to promote transparency  
145 regarding the types of conduct that lead to disciplinary action. When necessary to  
146 preserve recognized privacy interests, the agency may consider redacting information  
147 about particular cases or periodically providing summary reports describing the rules  
148 violated, the nature of the misconduct, and any actions taken.

### **Model Rules**

- 149 15. ACUS’s Office of the Chairman should consider promulgating model rules of conduct  
150 that would address the topics in this Recommendation. The model rules should account  
151 for variation in agency practice and afford agencies the flexibility to determine which  
152 rules apply to their adjudicative proceedings. In doing so, the Office of the Chairman  
153 should seek the input of a diverse array of agency officials and members of the public,  
154 including representatives who appear before agencies, and the American Bar Association.